United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT E. RUTHERFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 20377

Appeal from a judgment of the United States District Court for the Eastern District of Washington, Northern Division

HONORABLE CHARLES L. POWELL, *Judge*

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a certification and order by the District Court for the Eastern District of Washington, Northern Division, holding that the appellant Rutherford committed contempt of court in the presence of the Honorable Charles L. Powell. The contempt was summarily punished under the provisions of Rule 42(a) of the Federal Rules of Criminal Procedure. The alleged contempt consisted of the refusal of appellant witness to answer certain questions as to which the witness claimed the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States, after the District Court

had denied and overruled the claim of privilege and instructed him to answer. In consequence thereof the District Court provided in its order as follows:

> "IT IS ORDERED that the defendant Robert E. Rutherford be, and he hereby is committed to the custody of the Attorney General, or his representative, for imprisonment for a term of ninety (90) days.
>
> "IT IS ORDERED that the execution of said sentence be suspended pending a final order by the appropriate Appellate Court.
>
> "IT IS FURTHER ORDERED AND PROVIDED that in the event this order shall be sustained on appeal, the said defendant Robert E. Rutherford shall be afforded an opportunity to purge himself of said contempt within a time of sixty (60) days from the entry of said order."

This appeal is therefore prosecuted, and jurisdiction of this Court is conferred by 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The issue presented here is whether or not the District Court erred in denying and overruling the appellant's claim of privilege and then holding appellant in contempt for failure to answer the questions propounded in the presence of the Court. Appellant had refused to answer such questions propounded by appellee at deposition on the 17th day of November 1964.

STATEMENT OF THE CASE

The alleged contempt took place following the taking of the deposition of appellant Rutherford, on behalf of appellee pursuant to subpoena and stipulation

of counsel, which was continued thereafter before the Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, in the United States District Courtroom at the Federal Building, Spokane, Washington, on June 23, 1965 (CT pp. 48-52 incl., RT pp. 12-25 incl.).

The civil action, out of which contempt proceedings arose, was instituted by appellee in two counts pursuant to and as provided by Section 3490, et seq. of the Revised Statutes, Sections 231-233 incl. commonly known as the False Claims Act, and Section 4(A) of the Act of Congress of October 15, 1914, as amended (15 U.S.C. Sec. 15(a) commonly known as the Clayton Act). Appellee seeks damages with civil penalties from Carnation Company of Washington and Inland Empire Dairy Association, defendants in civil action No. 2297, for alleged conspiracy and agreement to defraud and injure appellee, and for conspiracy to eliminate and suppress competition in unreasonable restraint of interstate trade (CT pp. 11-22 incl.).

Prior to commencement of the civil proceedings on August 28, 1962, appellant Rutherford testified before a Grand Jury investigating anti-trust violations in the Eastern Washington area. Appellant, at the time of his appearance before the Grand Jury, refused to waive immunity and was required to testify. At the time of the Grand Jury investigation Mr. Joseph M. Glick, the manager of the Inland Empire Dairy Association, defendant in both the subsequent criminal indictment, and the civil action out of which these proceedings arose, did waive immunity. The Grand Jury indicted Carnation Company of Washington,

Inland Empire Dairy Association and Joseph M. Glick. Pleas of *nolo contendere* were made by all defendants to the indictment, and the Court, following acceptance of the *nolo contendere* pleas, adjudged all of the defendants guilty, fining Carnation Company $20,000.00, Inland Empire Dairy Association $20,000.00, and the defendant Joseph M. Glick $2,000.00 on Count I and $500.00 on Count II (CT pp. 1-7 incl., 8-10 incl., 24, 28).

Before he was required to appear for deposition by appellee, appellant Rutherford was sought to be deposed, by co-defendant in both criminal indictment and the civil action, Inland Empire Dairy Association, (deposition Robert E. Rutherford 10-15-64), and his refusal to testify was sustained by the District Court (CT pp. 24-25).

Thereafter deposition hearing was required by appellee (deposition of Robert E. Rutherford 11-17-64). Appellant refused to make answer to the questions put to him by appellee, justifying his refusal on the claim of protection granted him by the Fifth Amendment of the Constitution of the United States.

The District Court sustained the claim of immunity of the appellant in an opinion and subsequent order (CT pp. 28-33 incl.).

Following motion and memorandum submitted to the Court by appellee to reconsider the order sustaining appellant's refusal to answer questions of appellee, the Court granted appellee's motion to reconsider and entered its order that appellant witness Rutherford shall, when called, answer the questions

put to him by counsel during the further taking of testimony by deposition (CT 34-36 incl., 41-49 incl.). Thereupon the appellee in continuance of the deposition in open Court before the District Judge, Honorable Charles L. Powell, propounded again the series of deposition questions. Appellant invoked the Fifth Amendment and refused to answer. Upon being advised by the Court that he was clothed with immunity and must answer, the appellant continued to refuse and was held in contempt of Court (RT pp. 12-25 incl.).

Following entry of the certification and order of the Court on the 24th day of June, 1965, appellant timely filed notice of appeal to this Court.

In accord with this Court's order the record on appeal was thereafter timely docketed and the statement of points filed.

CONSTITUTIONAL CLAUSES AND STATUTES INVOLVED

Constitution; Amendment 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of war or public danger; *nor shall any person* be subject for the same offense to be twice put in jeopardy of life or limb; nor shall *be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (Clause underscored).

15 U.S.C. 32:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under Sections 1-7 of this title and all Acts amendatory thereof or supplementary thereto, and Sections 8-11 of this title; provided, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

* * * * *

15 U.S.C. 15:

"Sec. 15. Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

* * * * *

15 U.S.C. 15(a):

"Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover actual damages by it sustained and the cost of suit."

31 U.S.C., Sec. 231. Liability of persons making false claims.

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person

who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

* * * * *

31 U.S.C., Sec. 232. Same; suits; procedure:

"(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

"(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill

of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

"(D) In any suit whether or not on appeal pending on December 23, 1943, brought under

this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C) of this section.

"(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

"(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or

that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States."

* * * * *

31 U.S.C., Sec. 233. Duty of United States attorney as to such cases.

"It shall be the duty of the several United States attorneys for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

STATEMENT OF POINTS

1. Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment for the reason, that the extent of immunity granted within 15 U.S.C. Section 32 does not extend to the civil action brought by the United States in its suit for damages, because it is not a suit proceeding or prosecution under the meaning of 15 U.S.C. Section 32. The suit for damages of plaintiff United States is not a proceeding for enforcement of the Anti-Trust Laws.

2. Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that the proceedings wherein he so declined arose out of a civil action for damages in two counts, the first pursuant to proceedings under the False Claims Statute, and the other pursuant to proceedings under the Anti-Trust Laws, the first of which because of material and substantial differences, and requirements of proof, precludes any extension of immunity to Rutherford's testimony if, in fact, any immunity attached under 15 U.S.C. Section 32.

3. Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that he had a substantial and reasonable cause to apprehend danger in the testimony sought to be elicited from him, because the proceedings in the civil action, evidenced by the record filed in this Court and cause, show that plaintiff United States and co-defendant Darigold not only sought, but promised to elicit testimony which had the probable and reasonable consequence of involving the witness in crimes committed subsequent to and following his testimony before the Grand Jury.

4. The immunity statute considered here and pertinent to these proceedings, 15 U.S.C. Section 32, is contrary to the provisions of the Fifth Amendment to the United States Constitution, and should now be held to be unconstitutional.

ARGUMENT

I.

Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment for the reason, that the extent of immunity granted within 15 U.S.C. Section 32 does not extend to the civil action brought by the United States in its suit for damages, because it is not a suit proceeding or prosecution under the meaning of 15 U.S.C. Section 32. The suit for damages of plaintiff United States is not a proceeding for enforcement of the Anti-Trust Laws.

We respectfully submit that "by any common-sense reading . . ." of 15 U.S.C. Section 32, it could not extend immunity to a civil action by the United States under 15(a), unless the action is within, or contemplated as supplementary to the Appropriations Act of 1903, discussed in *United States v. Welden,* (1964, 377 U.S. 95, 84 S. Ct. 1082, 12 L Ed 2d 152).

We propose to demonstrate that a civil action by the Government for damages under 15 U.S.C. 15(a) is not a proceeding for *enforcement* of the antitrust laws, and therefore the Government cannot avail itself of a witness' testimony, otherwise immunized by 15 U.S.C. 32.

15 U.S.C. Section 32 was enacted as a part of an Appropriations Act of 1903 and provides as follows:

> *"That for the enforcement of the provisions* of the Act entitled 'An Act to regulate commerce' approved February fourth 1887, and all Acts amendatory thereof or supplemental thereto, and of the Act entitled 'An Act to protect trade and

> commerce against unlawful restraints and monopolies,' approved July second 1890, and all Acts amendatory thereof or supplemental thereto, and Sections 73, 74, 75, and 76 of the Act entitled 'An Act to reduce taxation, to provide revenue for the government, and other purposes' approved August 27, 1894, the sum of five hundred thousand dollars to be immediately available, is hereby appropriated, out of any money in the Treasury not heretofore appropriated, to be expended under the direction of the Attorney-General in the employment of special counsel and agents of the Department of Justice to conduct proceedings, suits and prosecutions under said Acts in the Courts of the United States; provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said Acts . . . 32 Stat. 903-904" (Emphasis supplied).

Not so long ago one Welden, feeling assured that he did so without risk, testified before a subcommittee of the House Select Committee on Small Business concerning matters of interest to the committee, such as conspiracies to fix milk prices and defraud the United States. It developed that Welden's assurance, from whatever source it may have come, was either mistakenly based, or ill-advised. Upon being indicted along with others on charges of conspiring to fix milk prices and to defraud the United States in violation of Section 1 of the Sherman Act and the Conspiracy Act, Welden sought dismissal on the ground that the prosecution was barred under the immunity provisions of the Act of February 25, 1903. He argued that he had previously testified before a subcommittee on

small business concerning the very matters covered by the indictment. Although the district judge rejected the government's contention that the immunity provisions of the Act extended only to judicial proceedings and not to hearing before Congressional committees, the Supreme Court reversed, and though two learned justices dissented, the majority asserted that:

> "By any common-sense reading of this statute, the words 'any proceeding, suit, or prosecution under said Acts' in the proviso plainly refer to the phrase 'proceedings, suits, and prosecutions under said Acts *in the Courts of the* United States' in the previous clause. The words 'under said Acts' confirm that the immunity provision is limited to judicial proceedings, *which are brought 'under' specific existing Acts* [Emphasis supplied], such as the Sherman Act, or the Commerce Act. Congressional investigations, although they may relate to specific existing Acts, are not generally so restricted in purpose or scope as to be spoken of as being brought 'under' these Acts (377 U.S. 96, 97, 12 L Ed 2d 156).

We think it only logical, that since the words "in any proceedings, suit, or prosecution under said Acts" are to be modified by "in the courts of the United States," it is common-sense to assert that these words should also be modified by the word "enforcement" found in the introduction to the Appropriations Clause. Nor should we be mesmerized by any implication that the Fifth Amendment protection has lost its force because we can find over forty immunity acts within the confines of the *United States Code* (Yale Law Journal, Vol. 72, p. 1568). Indeed we should push into view the argument for reason, that finds

predominant support in legal authority, rules of construction, normal and accepted usage of words and terms, legislative history, and the statutory scheme.

The word "enforcement" can be employed in a variety of meanings, which come to depend upon the usage of the word in conjunction with, and in relation to criminal prosecutions, judgments, contracts, etc. Thus we speak of "enforcing" a contract, or a judgment. "Enforcement" in the context of the Appropriations Act of 1903 in normal and accepted usage relates only to declared purposes of the Act by way of criminal prosecution, injunction, or investigation. The Appropriations Act of 1903 gives not one hint that immunity was to be given in a 15(a) civil suit by the United States. Thus, the government utilizes a statute permitting damages, it does not enforce it.

Pertinent legislative history is found in Senate Report No. 619, *United States Code, Congressional and Administrative News, 84th Congress* (1955) Vol. 2:

> "Proposals to permit the United States to sue for damages occasioned by antitrust violations have been directed to the Congress in past years. Section I of the Sherman Act as originally introduced in 1890 contemplated such an action by the United States in addition to other methods of enforcing the Act. The original Act was amended, and subsequently rewritten omitting reference to damage suits by the government and providing specific criminal and civil remedies by way of forfeiture. The damage suit by private parties was retained as Section 7 of the Sherman Act.
>
> "At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective

method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits" (p. 2329).

* * * * *

"*United States v. Cooper Corporation* (312 U.S. 600, 85 L Ed 1071, 61 S. Ct. 742 (1941) construed Section 7 of the Sherman Act to exclude the United States as a 'person' who might sue for the recovery of treble damages.

"It should be noted, however, that the bill would grant to the Government the right to recover *only actual, as distinguished from treble damages.* This difference in treatment is a recognition of the difference in the position of the United States and of 'persons' in this connection. Both may recover their actual damages. The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws. The United States is, of course, charged by law with the enforcement of the antitrust laws and it would be *wholly improper* to write into the statute a provision whose chief purpose is to promote the institution of proceedings. *The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered*" (Emphasis supplied).

"*The committee feels that this remedial amendment to the existing statutes* is important even in normal times when the large volume of government procurement may often subject the United States to unjustified exaction" p. 2330 (Emphasis supplied).

"It can therefore be seen that not only are the provisions of State law establishing time limitations upon actions to recover a statutory liability inconclusive in so far as ascertaining the correct

period in which to bring suit is concerned, but they frequently create the additional problem of determining whether the statutory liability imposed under the antitrust laws is in the nature of a penalty or forfeiture, or otherwise."

We think that *United States v. Cooper Corp.*, 312 U.S. 600, 85 L Ed 1071, 61 S. Ct. 742, viewed in the light understood by the Congress in its legislative capacity, emphasizes the distinction between the civil remedy and the "enforcement" provisions of the Anti-Trust Act. So we read in *Cooper Corp.*, supra, as follows:

"The scheme and structure of the legislation are likewise important to a proper ascertainment of its purpose and intent. Sections 1, 2, and 3 impose criminal sanctions for violations of the acts denounced in those sections respectively. Section 4 gives jurisdiction to the federal courts of proceedings by the Government to restrain violations of the Act and imposes upon United States Attorneys the duty to institute equity proceedings to that end. Section 5 regulates service in such suits. Section 6 authorizes seizure, in the course of interstate transportation, of goods owned under any contract or pursuant to any conspiracy made illegal by the statute.

"Thus far the Act deals in detail with the criminal and civil remedies of the Government in vindication of the policy of the legislation. There follows Sec. 7, the only other substantive section, giving a civil action for an injury to property rights.

"It seems evident that the Act envisaged two classes of actions,—those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury. If this be the fair construction of the Act, the Court's task is finished when it gives effect to the purposes of the law, evidenced by the various rem-

> edies it affords for different situations. Though the law gave a remedy by way of injunction at the suit of the United States, we were pressed to say that a private person should have the same remedy. We were compelled to answer that Congress had not seen fit so to provide. *For the like reasons we cannot hold that since a private purchaser is given a remedy for his losses in treble damages, the United States should be awarded the same remedy.*" (Emphasis supplied) (pp. 606-609 of 312 U.S.).

The reasoning of *Cooper,* supra, denies any claim that 15(a) is an "enforcement" statute.

Despite a paucity of court opinions directed to the problem here, there is support in *City of Burbank v. General Electric Co.,* a corporation, 329 F. 2d 825 (C.A. 9):

> "(2) In considering the language to be interpreted, we find a slight change was made in it between the 1914 enactment, and the 1955 revision. The two primary concerns of the 1955 amendment to the Clayton Act (38 Stat. 730) were to grant the United States the right to recover *actual damages for injuries to its property* by reason of violation of the antitrust laws. (Clayton Act, Sec. 4(A), 15 U.S.C. sec. 15a) and to establish a uniform (four year) statute of limitations (Clayton Act, Sec. 4(B), 15 U.S.C. Sec. 15b)" p. 830 (Emphasis supplied).

That Congress did not intend that the umbrella of immunity should extend to witnesses in a 15(a) action *emerges from the fact that a civil action by the Government is remedial* and civil, not penal, for the United States is treated solely as a buyer of goods, proceeding under a strictly remedial amendment to the existing statute, which is clearly not an "enforce-

ment" provision. Additional amendments enacted with 15 U.S.C. 15(a) disclose that it is not an "enforcement" weapon. The United States has heretofore "enforced" the antitrust statutes; the civil action permits it only the remedial remedy accorded in the 15(a) amendment.

The underlying test to be applied in determining whether a statute is penal or remedial is whether *primarily* it seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual as just and reasonable compensation for a possible loss having a causal connection with a breach of the legal obligation owing under the statute to such individual.

Pertinent to the above in connection with 15 U.S.C. 15 is *City of Atlanta v. Chattanooga Foundry and Pipe Co.,* 127 F. 23, affirmed, 203 U.S. 390, 27 S. Ct. 65, 51 L Ed 241:

> "The remedy is not given to the public, for no one may bring the action save the person 'who shall be injured,' etc.; and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the Act and additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of

compensation is not enough to constitute the action a penal action, . . ."

And see:

Aero Sales Co. v. Columbia Steel Co., 119 F. Supp. 693 (Dist. Ct. Calif. 1954).

With a view now to legislative history, *Welden,* supra, statutory construction and usage, and the remedial and civil character of 15 U.S.C. Sec. 15, we shall look at 15 U.S.C., Sec. 16(a)(b):

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.*

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, *but not including an action under section 15a of this title,* the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is

suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. As amended July 7, 1955" (Emphasis supplied).

Thus, the United States is treated the same as a "person" for it is entitled only to the same benefits provided other "persons" designated by the Congress. And here again *Cooper,* supra, provides guidance in its discussion of the statutory provisions creating estoppel by judgment and a statute of limitations.

> "When Congress came to supplement the Sherman Act by the Clayton Act, it included in the latter a significant section bearing upon the question under consideration. Doubts had arisen as to whether issues adjudicated in a criminal proceeding or a suit in equity brought by the United States should be taken as concluded in an action for treble damages subsequently brought by an injured party. By Sec. 5 of the Clayton Act, 15 USCA Section 16, it was sought to give such adjudication that effect. The section provides:
>
> > 'A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* this section shall not apply to consent judgments or decrees entered before any testimony has been taken.'

"Immediately following this provision the section continues:

> 'Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.'

> *"Here again it seems clear that Congress recognized the distinction between proceedings initiated by the Government to vindicate public rights and actions by private litigants for damages"* (Emphasis supplied) (312 U.S. 609, 10).

Certainly these amendments belong in the conduit of Congress' intention that 15(a) is not an "enforcing" provision within 15 U.S.C. 32. Also see Black, J., dissenting in *Welden,* supra:

> "The Antitrust Immunity Act of 1903 was passed at a time when the fear of prosecution was making testimony from witnesses often impossible to obtain and thereby impeding enforcement of the antitrust laws."

We submit in concluding this phase of argument that the certification and order of the District Court warrants reversal, keeping in mind that:

> "But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made . . ."

> ". . . it is not for the courts to indulge in the business of policy making in the field of antitrust legislation . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of congress" (*United States v. Cooper Corp.,* 312 U.S. pp. 604-606).

tions which could relate to subsequent crimes (See Point 3, infra).

> "We recently elaborated the content of the federal standard in *Hoffman*:
>
> > 'The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . if the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure would result' (341 U.S., at 486-487).
>
> "We also said that, in applying that test, the judge must be '*perfectly clear,* from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answers *cannot* possibly have such tendency to incriminate' (341 U.S., at 488)."

Persuasive text treatment is found in *8 Wigmore, Evidence* (McNaughton Revision, 1961) Sec. 2262, pp. 509-511:

> "(b) A further question arises as to *other crimes by the witness himself.* That is, does the immunity extend to offenses to which his disclosures relate other than the one (if any) charged in the indictment or sought for in the proceeding? Here almost all depends on the words of the statute. The statute may use broad or narrow terms. Those terms must of course be taken as marking the limits, for the legislature has

power to make the immunity either larger or smaller than necessary and the only question can be what intention is expressed by the statute.

"The foregoing question, it is to be noted, may arise in one of two ways. Either the individual *has made disclosure* tending to incriminate him of some offense, is later charged with it and then pleads an immunity gained by his disclosure; or he *refuses disclosure,* alleging that it might tend to incriminate him of some separate offense not covered by the immunity and that therefore it is still privileged, the prosecution alleging the contrary and asking that an answer be compelled. At one time it could be said that the decision should be the same in whichever of these ways the question arose. However, the drastic expansion in recent years of the concept of what 'tends to incriminate' (Sec. 2260 supra) has shaken the symmetry. It is likely today (at least in the federal courts) *that a refusal to disclose will be upheld when there is only the remotest risk of prosecution for a crime* not covered by the immunity statute, while it is by no means clear that even a 'complete' immunity statute (see Sec. 2263 infra) will protect a witness from prosecution for any and every crime to which only the most fertile imaginations can relate his compelled testimony" (Emphasis supplied).

In any event, it appears that the False Claims statute does differ from the Anti-Trust Act "in a substantial way." That standard, as defined by Mr. Justice Holmes, should confirm in appellant Rutherford his right to invoke the Fifth Amendment in the 15(a) action of the United States.

Trusting that appellee will forgive the writer's plagiarizing, we turn to appellee's own memorandum submitted in the civil proceedings here, to advance the argument made here:

> "There are numerous examples of conduct which run afoul of one act, without violating the other. For example, a supplier of goods to the Government who, with an intent to deceive the Government, substitutes goods of an inferior quality for the products called for by the contract specifications, violates the False Claims Act, even though such fraud would not constitute an antitrust violation. Conversely, numerous examples of conduct which would justify recovery under Sec. 4A, but not under the False Claims Act, come to mind. Illustratively, the Government as a purchaser from a monopolist could bring an action under Sec. 4A for damages based on overcharges resulting from the unlawful monopoly. *Muskin Shoe Co. v. United Shoe Machinery Corp.,* 167 F. Supp. 106 (D. Md. 1958). An even more likely example would occur where the Government purchased from innocent distributors who were reselling products that had been the subject of price-fixing agreements between manufacturers. Unless the manufacturers were aware that the goods were to be resold to the Government (cf. *United States ex rel. Marcus v. Hess,* 41 F. Supp. 197 (W.D. Pa. 1941), *aff'd.* 317 U.S. 537 (1943), they could not be considered to be making such a claim against the Government for payment as would bring them within the False Claims Act, although they might be found liable under Sec. 4A."

In connection with the comment on *Marcus v. Hess,* supra, we suggest that *United States v. McNinch,* 356 U.S. 595 (1958), widens the gulf of dissimilarity between the False Claims Act and the Anti-Trust Acts. Although in *Hess,* supra, the opinion strived to give the False Claims Act a certain range of applicability, *McNinch* seems as equally preoccupied with restricting the applicability of the False Claims Act. Thus, the court in *McNinch* concluded that "the False Claims

Act was not designed to reach every kind of fraud practiced on the Government" (*McNinch*, p. 599). As a consequence the requirement by the court of a specific "fraud" tends to further create the "substantial difference" between the False Claims Act and the Anti-Trust Acts.

Thus the Acts reach completely different conduct, and as the appellee has heretofore convincingly argued in the lower court, their respective coverage differs. Periods of limitation are so entirely different that unlawful conduct which may be barred under one Act may not be barred under the other. And as appellee has convincingly argued:

> "The False Claims Act provides that suit 'shall be commenced within six years from the commission of the act, and not afterward,' (31 U.S.C. Sec. 235), whereas a Sec. 4A action must be commenced 'within four years after the cause of action accrued' under Section 4B of the Clayton Act (15 U.S.C. 15b). In suits under the False Claims Act, the statute is said to run from the 'time the first event of legal significance occurred —the time the defendant first became chargeable with the commission of any act prohibited by the statute.' (*United States ex rel. Nitkey v. Dawes*, 151 F. 2d 639 (7th Cir. 1945), *cert. den.* 327 U.S. 788 (1946). Further, it has been held that the limitation period is not extended by fraudulent concealment. *United States v. Borin*, 209 F. 2d 145 (5th Cir. 1954) *cert. den.* 348 U.S. 821 (1954).
>
> "On the other hand, in damage actions under the antitrust laws, most courts hold that the statute does not begin to run until the commission of the last overt act causing the alleged damage, *Steiner v. 20th Century Fox*, 232 F. 2d 190 (9th Cir. 1956), or until the date when damages

have occurred. *Delta Theatres v. Paramount Theatres,* 156 F. Supp. 644 (E.D. La. 1958). Furthermore, the statute is tolled by fraudulent concealment. *Moviecolor Limited v. Eastman Kodak Co.,* 288 W. 2d 80 (2nd Cir. 1961)."

III.

Appellant Rutherford was justified in declining to testify on his claim of privilege under the Fifth Amendment, for the reason that he had a substantial and reasonable cause to apprehend danger in the testimony sought to be elicited from him, because the proceedings in the civil action, evidenced by the record filed in this Court and cause, show that plaintiff United States and co-defendant Darigold not only sought, but promised to elicit testimony which had the probable and reasonable consequence of involving the witness in crimes committed subsequent to and following his testimony before the Grand Jury.

The classic statement of privilege as applicable to one who is a witness and not a defendant in criminal prosecutions, is that the witness may not be required to reveal facts which "tend to incriminate" him. To understand what those facts are which "tend to incriminate," we go to the case which first announced the authoritative and current interpretation of the Fifth Amendment. In *Blau v. United States,* 340 U.S. 159, the petitioner had been convicted of contempt for invoking the privilege when asked by a Grand Jury questions concerning her "employment by the Communist Party or intimate knowledge of its workings." That membership in that Party was lawful, *had*

seemed sufficient to the lower courts to overrule the claim of privilege. The Supreme Court was not in agreement:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. The answers to the questions asked by the Grand Jury would have furnished a link in a chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act."

If appellant Rutherford had immunity to testify in the civil action, which we deny, it could extend only to such crimes disclosed by him before the Grand Jury, which were committed on or before the date of his testimony before the Grand Jury in March, 1962. He could certainly be prosecuted for any criminal act committed after that date, regardless of the nature of the Grand Jury testimony, for immunity protects the witness from past and not subsequent acts of crime.

In *Malloy v. Hogan* (1964) 378 U.S. 1, 12 L Ed 2d 653, the defendant had been arrested and convicted of charges of pool-selling. While under sentence for the conviction he was asked to testify in an interrogation which was part of a wide-ranging inquiry into crime, including gambling. He was asked to identify the person who ran the pool-selling operation, and his refusal to so testify was sustained by the Supreme Court, which held that such disclosure of the person's name might furnish a link in a chain of evidence sufficient to connect the defendant with a more recent crime for which he could still be prosecuted.

"The conclusions of the Court of Errors, tested by the federal standard, fails to take sufficient account of the setting in which the questions were asked. Interrogation was part of a wide-ranging inquiry into crime, including gambling, in Hartford. It was admitted on behalf of the State at oral argument—and indeed it is obvious from the questions themselves—that the State desired to elicit from the petitioner the identity of the person who ran the pool-selling operation in connection with which he had been arrested in 1959. It was apparent that petitioner might apprehend that if this person were still engaged in unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted.

"Analysis of the sixth question, concerning whether petitioner knew John Bergoti, yields a similar conclusion. In the context of the inquiry, it should have been apparent to the referee that Bergoti was suspected by the State to be involved in some way in the subject matter of the investigation. An affirmative answer to the question might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to his relationship with a possible criminal. See: *Rogers v. United States,* 340 U.S. 367. We concluded, therefore, that as to each of the questions, it was 'evident from the implication of the question, in the setting in which it (was) asked, that a responsive answer to the question or an explanation of why it (could not) be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States,* supra, 341 U.S. 486-487; see *Singleton v. United States,* 343 U.S. 944."

In like vein is *U.S. v. Johns-Manville Corporation* (Pennsylvania 1962) 213 F. Supp. 65. There it was pointed out that the immunity which attached because

of testimony before the Grand Jury, did not cover any conspiratorial acts subsequent to the time the testimony was given, nor would it cover a different conspiracy or other violations of the Anti-Trust Laws.

The privilege of a witness extends to all judicial or official hearings, investigations or inquiries where persons are formallly called upon to give testimony. A witness accordingly has Fifth Amendment protection, not only in a judicial trial in a civil or criminal case, but in any deposition or hearing thereon. Appellant Rutherford is a court witness and not a party to the present litigation. He is subpoenaed by the Government to *contribute such information as he may have to any issue or problem before the tribunal,* not merely to win a lawsuit. And all of the courts hold that if a witness testifies *at all* in relation to a given subject, he must submit to a full, legitimate cross-examination in reference thereto. He cannot give a description of an incident and avoid testing his description by the customary techniques of cross-examination.

In the pending civil action against the two dairy companies, which are ably represented, it is certain that the co-defendant Inland Empire Dairy Association cannot be barred from the introduction of direct evidence or from questioning, as to times, events, documents, persons or other available evidence of admissible character which is deemed necessary. This action is not a duet between the United States and Carnation, with only the government prescribing the dialogue.

Appellant Rutherford, under the circumstances, has a real, and not illusory apprehension of danger in testifying in the civil case. The record in this cause clearly indicates that it is sheer conjecture to adopt an absolute, that the case will never venture past the fifty-yard line into proscribed territory because the Government says it intends not to do it, and in some way hopes that the litigants can or will do the same.

Note the following:

> "Mr. ETTER: I am at some quandary yet, as to the extent of the supervision of your Honor at the time of the deposition assuming there is an election and he tries to take Mr. Rutherford's deposition again. I know I can apply for a protective order, that is true, but we are talking about immunity, we are talking about the 5th Amendment, we are talking about individual questions that they may propound at the time. Are we talking about confining any questions they ask to issues solely on the anti-trust count?
>
> "The COURT: Yes. If the Government is sincere, that the proof on the anti-trust count will prove the other one, they shouldn't object to that.
>
> "Mr. MCLAUGHLIN: I have no objection to that, your Honor. Would you like to have the Government make an oral motion to that effect?
>
> "The COURT: No, I don't think it is necessary.
>
> "Mr. MCLAUGHLIN: *I think the witness may need protection from cross-examination, I don't know*" (CT 44-45) (Emphasis supplied).

In addition to the above, it is clear from examination of the deposition of appellant Rutherford taken on the 17th day of November, 1964, that matters are going to be inquired into of the witness which occurred subsequent to his testimony before the Grand

Jury, and which in all probability could furnish a vital link in a chain of evidence that could result in appellant's conviction of crime (Dep. pp. 12-20 incl.).

A brief review of the controlling opinions supports appellant's position.

Counselman v. Hitchcock, 142 U.S. 547, has been criticized on the ground, that when the Court reasons that furnishing a clue to other evidence that will incriminate is itself incriminatory, it extended the privilege beyond the traditional scope of "giving evidence against oneself." The holding, it has been said, is a far-fetched and impolitic extension. But approval of *Counselman* and the extension of the privilege was implicit in *Hoffman v. United States,* 341 U.S. 479, 488, where the Court indicated a further trend in the direction of recognizing the privilege when there is a mere possibility of danger, and yielding to the claim unless it is "perfectly clear" . . . that the witness is mistaken and that the answer *"cannot possibly"* have a tendency to incriminate. *Hoffman,* was met with approval in *Malloy v. Hogan,* supra, and adds weight to the assertion that the Court has approvingly cast its view again in the direction of recognizing the privilege, when there is a possibility of danger. The dissent of Justice White, concurred in by Justice Stewart, comes close to defining that direction.

Finally, although it is the privilege of an accused in a criminal prosecution not to be called or sworn as a witness at the State's instance, an ordinary witness has no such broad exemption. He is required to submit to be called and sworn by either party and to an-

swer all questions except incriminating ones. This practical difference is substantial because the ordinary witness has the burden of sifting out the incriminating questions and claiming privilege as to them. This is a difficult and trying task, further compounded by the question of waiver.

It is accepted generally, that the ordinary witness may by entering upon the story of a crime, waive his privilege against disclosure of other facts which are part of the same story. But when does waiver occur? Broadly, when the question calls for some fact that may be an essential part of a crime, or even a link in a chain of circumstantial evidence, which in the entire setting would lead the judge to believe that there was probability that the answer would endanger the witness.

Waiver is a vague and elusive standard which under varying circumstances is difficult to determine. When so many judges cannot with reasonable certainty determine the point at which waiver occurs, it is difficult to require an exact timing from a lawyer or a witness relating to that question. Appellant Rutherford should not be burdened with that onerous task.

IV.

The immunity statute considered here and pertinent to these proceedings, 15 U.S.C. Section 32, is contrary to the provisions of the Fifth Amendment to the United States Constitution, and should now be held to be unconstitutional.

We first turn to *United States of America v. William Ludwig Ullmann,* 221 F. 2d 760. Therein we find Judge Frank speaking for the Court as follows:

> "It is well to add a few words about defendant's contention concerning the doctrine of *Brown v. Walker,* 161 U.S. 591, 16 S. Ct. 644, 40 L Ed 819, which held that the Fifth Amendment privilege against self-incrimination relates solely to testimony that might lead to defendant's prosecution for a crime. Defendant asks us to modify this doctrine in the light of new circumstances which have since arisen. We are not prepared to say that this suggestion lacks all merit. But our possible views on the subject have no significance. For an inferior court like ours may not modify a Supreme Court doctrine in the absence of any indication of new *doctrinal trends* in that Court's opinions, and we perceive none that are pertinent here. Accordingly, the argument must be addressed not to our ears but to eighteen others in Washington, D.C." (Emphasis supplied).

It may be that this Court will suggest that this argument too be directed to the higher court, though we perceive the indication of a new doctrinal trend in matters concerning the Fifth Amendment.

In *Ullmann,* supra, we direct the Court's attention to the concurring opinions:

> "I concur, but regretfully. For the steady and now precipitate erosion of the Fifth Amendment seems to me to have gone far beyond anything within the conception of those justices of the Supreme Court who by the narrowest of margins first gave support to the trend in the 1890's" Clark, Chief Judge, p. 763).

> "If this matter were one of first impression I could easily reach the conclusion that the immunity statute in question is in effect a circuitous attempt to circumvent the Constitution by a short-cut leg-

islative statute amending the Fifth Amendment" (Galston, District Judge, p. 763).

Ullmann v. United States, 350 U.S. 422, was decided by the Supreme Court on March 26, 1956, with Justices Douglas and Black dissenting. Therein, the Court reaffirmed *Brown v. Walker,* 161 U.S. 591, which has constantly been the stumbling block to modern critical appraisals of immunity statutes.

We turn back from *Ullmann,* supra, to *Boyd v. United States,* 116 U.S. 616. Information was filed on behalf of the United States which sought the forfeiture of property alleged to have been fraudulently imported without the payment of duties. On motion of the Government, pursuant to an Act of 1874, the District Court ordered the production of certain records. The defendant, after objecting to the constitutionality of the 1874 Act, produced the records but unsuccessfully objected to their receipt in evidence. There was a judgment of forfeiture, but the Supreme Court reversed the judgment of the lower courts and decided that, "a witness . . . is protected by the law from being compelled to give evidence that tends to incriminate him, or to subject his property to forfeiture" (p. 638).

In *Boyd* we note the following:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, mainly, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives

them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon" (116 U.S. at 365).

Thereafter followed *Counselman v. Hitchcock,* 142 U.S. 547, which was the first Supreme Court case to deal with the validity of an immunity statute designed to displace the protection afforded by the constitutional privilege of the Fifth Amendment. A shipper was asked to testify before a Grand Jury as to alleged rebates given to him by a group of railroads in violation of the Interstate Commerce Act. The shipper refused to give such testimony despite the immunity statute, and the Supreme Court unanimously sustained the witness' refusal, asserting that the immunity did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard . . ." (142 U.S. at 585-586, and see supra this brief p. 35). And the Court further asserted that "we are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States" (p. 585).

Following *Counselman v. Hitchcock,* supra, a new immunity statute had been passed apparently as the result of criticism of the court's opinion. *Brown v. Walker,* supra, which followed upon the heels of the passage of the new immunity statute involved a Grand Jury investigation into alleged rebates in vio-

lation of the Interstate Commerce Act, as before, but the witness was the auditor of the railroad company and presumably had nothing to do with granting the rebates. In any event, and despite the immunity statute, the witness refused to answer questions relating to the rebates alleging that his answers would tend to accuse and incriminate him. He was directed to answer by the lower courts, while thereafter a majority of the Supreme Court also concurred against him. Since *Brown v. Walker,* supra, the courts have been inclined generally to treat that opinion as decisive.

It is of more than passing interest to note that *Brown v. Walker,* supra, was decided by a vote of five to four, and that the opinion was written by Mr. Justice Brown, the most recent appointee of the court which had decided *Counselman v. Hitchcock.* Between the date of that decision and *Brown v. Walker,* there had been numerous changes in the composition of the Court. Justice Bradley, who had written the opinion of the Court in *Boyd v. United States,* supra, and who also participated in *Counselman,* supra, had died shortly after the decision in that case was handed down. Four of the six justices who had decided *Counselman* joined the majority in *Brown v. Walker,* while two new justices, Shiras and White, joined in the *Walker* dissent. In the dissent written by Justice Shiras we find:

> "The constitutional privilege was intended as a shield for the innocent as well as for the guilty. A moment's thought will show that a perfectly innocent person may expose himself to accusation, and even condemnation, by being compelled to

disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.

"But surely no apology for the Constitution, as it exists, is called for. The task of the Courts is performed if the Constitution is sustained in its entirety, in its letter and spirit."

Now at the time of the decision in *Ullman,* supra the justices of the Supreme Court were Warren, Black, Douglas, Clark, Harlan, Burton, Frankfurter, Reid and Minton.

We note that change has since occurred in the trend of the Court's opinions. See *Malloy v. Hogan,* supra, *Murphy v. Waterfront Commission,* 378 U.S. 52, 12 L Ed (2d) 678, Due process and Search and Seizure Cases. In *Malloy v. Hogan,* the justices were Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Goldberg. Mr. Justice Goldberg has since been replaced by Mr. Justice Fortas, but it is a distinct probability that the dissenting opinion of Justices Black and Douglas in *Ullman* could well become the majority opinion, if addressed to the Court as now constituted. (See an excellent analysis of Immunity Statutes, *Columbia Law Review,* Vol. 57, p. 500, April 1957 *"Reflections on Ullmann v. U.S."*)

We submit that the constitutional grants to the individual should receive continuing support in the courts. And there is evident in judicial opinion the realization that there is responsibility to strengthen, not weaken the Constitution.

Immunity statutes continue to cloud the protection of the Fifth Amendment and to render its great meaning uncertain and vaccillating.

We submit that reversal should be had in this case. It is demanded by the needs and necessities of our times and by the most persuasive of judicial precedents.

Stare decisis should not be invoked to preserve questionable constitutional interpretation, for what may be asserted to be precedent here, has never gone unquestioned or received a unanimity of approval. On the contrary, criticism of immunity statutes continues to grow.

> "That a deliberate or solemn decision of a court or judge made after argument on a question of law fairly arising in a case and necessary to its determination is an authority or binding precedent in the same court or in other courts of equal or lower rank in subsequent cases where 'the very point' is again in controversy; but that the degree of authority belonging to such a precedent depends of necessity on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law; and that the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual rather than arbitrary or inflexible" (Daniel H. Chamberlain THE DOCTRINE OF STARE DECISIS, New York, Baker-Voorhis & Co. (1885).
>
> * * * * *
>
> "The conclusion of the majority of the court, whether right or wrong, is interesting as evidence of a spirit and tendency to subordinate precedent to justice. How to reconcile that tendency, which is a growing and in the main a wholesome one, with the need of uniformity and certainty, is one of the great problems confronting the lawyers and judges of our day. We shall have to feel our way here as elsewhere in the law. Somewhere between worship of the past and exaltation of the

present, the path of safety will be found" (Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS, Yale Univ. Press (1942), 149).

CONCLUSION

We submit to the Court that the certification and order of the District Court could be reversed, solely on Point 1. We are of the opinion, however, that in addition to the first point discussed, reversal is equally warranted on the basis of the argument submitted in support of points 2, 3 and 4.

Respectfully submitted,
R. MAX ETTER,
Attorney for Appellant

CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. MAX ETTER